1976

Jacobson v. Jacobson : Brief of Respondent

Utah Supreme Court

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BRIEF

OF THE STATE OF UTAH

CLYDE A. JACOBSON and REGINA J. JACOBSON,

Plaintiffs-Appellants,

vs.

CLYDE E. JACOBSON and ERMA B. JACOBSON,

Defendants-Respondents.

Case No. ~~39,647~~ 14507

BRIEF OF RESPONDENT

Appeal from a Judgment quieting title to real property in Defendants by the Fourth Judicial District Court for Utah County, State of Utah, Honorable George E. Ballif presiding.

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IN THE SUPREME COURT OF THE STATE OF UTAH

CLYDE A. JACOBSON and REGINA J. JACOBSON,	:	
Plaintiffs-Appellants,	:	Case No. 39,647
vs.	:	
CLYDE E. JACOBSON and ERMA B. JACOBSON,	:	
Defendants-Respondents.	:	

BRIEF OF RESPONDENTS

NATURE OF THE CASE

This action was initiated in 1974 for the purpose of canceling a deed whereby Respondents herein received title to the subject property from Appellants.

DISPOSITION IN THE LOWER COURT

This matter was tried before the Honorable George E. Ballif, in the Fourth Judicial District Court of Utah County, sitting without a jury. The Court made findings of fact and conclusions of law and entered judgment for Respondents, the Defendants below. The Court found that the deed to the prop-

erty vesting title in the Respondents is absolute and vests full legal title free and clear of any and all claims of the Appellants.

RELIEF SOUGHT ON APPEAL

Respondents submit that the decision of the trial court was correct and should be affirmed.

STATEMENT OF FACTS

On about August 28, 1962, Appellants purchased the property in dispute, approximately twelve acres of land located in Utah County, under a Uniform Real Estate Contract. Between 1962 and 1965, Appellants occupied the home periodically. During the early part of 1965, Appellants became delinquent on the payments for the purchase of the property. The sellers initiated foreclosure proceedings. As a result of an Order issued by the Fourth District Court, Appellants were allowed until June 8, 1965, to pay off the balance of the indebtedness to the sellers or a judgment of foreclosure would be entered.

On the last day that payment could be made, one Earl Stubbs, Appellant, and Respondent Jacobson, the father of Appellant Jacobson, met in the office of the sellers' attorney, Heber Grant Ivins. In order to save the property, Stubbs

advanced approximately $10,000.00; and Respondent Jacobson advanced $4,538.10 for the payment of the obligation to sellers.

Discussion was had with regard to securing the position of Stubbs. As an alternative to a formal mortgage, a deed was executed by Appellants. It appears that the deed was sent to Stubbs by Attorney Ivins who handled the transaction. The deed was signed by both Clyde A. Jacobson and Regina J. Jacobson, Appellants.

Appellants failed to pay to Stubbs and Clyde E. Jacobson the monies advanced to the sellers on June of 1965. As a result of the failure to pay by Appellants, Respondent, Clyde E. Jacobson, paid off the balance of the debt to Stubbs. The deed was subsequently recorded on July 18, 1966. From that time until the time of the hearing of this matter, Respondents paid all of the taxes and insurance as they became due on the property. No payments of any kind were made by Appellants after 1965.

During the period from 1966 to the initiation of this action by Appellants, the property was occasionally occupied by Appellants. They, together with other members of Respondents' family, lived on the property. Clyde E. Jacobson, father of Appellant, Clyde A. Jacobson, saw that the property was taken care of and that the crops were harvested. The ownership of Respondents was not only evidenced by way of recordation

but also by open and obvious use of the property.

POINT I

EVEN WHEN THE PROCEEDING TO BE REVIEWED IS IN EQUITY, THE TRIAL COURT'S FINDINGS AND JUDGMENT ARE PRESUMED CORRECT.

A suit to have a deed, absolute in form, declared to be a mortgage, is a suit in equity. Article VIII, Section 9 of the Utah Constitution allows the Supreme Court to review questions of law and fact in equity cases. Crockett v. Nish, 106 Utah 241, 147 P.2d 853 (1944). In an appropriate case, this Court can substitute its judgment for that of the trial court, Mitchell v. Mitchell, 527 P.2d 1359 (Utah 1974), but it has been made abundantly clear that this does not amount to a trial de novo on the merits. The Appellant has the burden of proving by a clear preponderance of the evidence that the trial court's findings and judgment are erroneous. The Supreme Court will review the evidence and all inferences fairly to be drawn therefrom in the light favorable to the trial court's findings and judgment. Olsen v. Park Daughters Investment Co., 29 Utah2d 421, 511 P.2d 145 (1973).

As the Court stated in Del Porto v. Nicolo, 27 Utah2d 286, 495 P.2d 811 (1972):

> It is true, as plaintiff asserts, that this action to avoid deeds is one in equity upon

> which this court has both the prerogative and the duty to review and weigh the evidence, and to determine the facts. However, in the practical application of that rule, it is well established in our decisional law that due to the advantaged position of the trial court, in close proximity to the parties and witnesses, there is indulged a presumption of correctness of his findings and judgment, with the burden upon the appellant to show they were in error; and where the evidence is in conflict we do not upset his findings merely because we may have reviewed the matter differently, but do so only if the evidence clearly preponderates against them.

This standard is made even clearer by Crockett v. Nish, supra, which is also an appeal from a refusal to declare an absolute deed to be a mortgage. There the court recognized its duty to make an independent analysis of the evidence, and stated:

> . . . if at the end of that investigation we are in doubt or even if there be a slight preponderance in our minds against the trial court's conclusions we will affirm.

Other jurisdictions have a standard at least this stringent. For example, where a trial court resolved conflicting evidence in favor of the defendant in an action to cancel a deed, the New Mexico Supreme Court considered itself bound thereby. Westover v. Harris, 137 P.2d 771, 774 (N.M. 1943). Perhaps a better rule is found in Blue River Sawmills, Ltd. v. Gates, 358 P.2d 239 (Or. 1960), also an action to have an absolute deed declared a mortgage. In that case, noting the trial court's superior advantage in a matter of this kind, the Oregon Supreme

Court was inclined to accept his judgment as "very persuasive".

In addition to the foregoing, it should be kept in mind that the plaintiff faces an especially strict standard of proof that must be met in order to have an absolute deed declared a mortgage. The standard is something more than the usual requirement of a preponderance, or greater weight of the evidence, and something less than proof beyond reasonable doubt. Child v. Child, 8 Utah2d 261, 332 P.2d 981, 986 (1958). This Court required that the evidence, to be adequate for this purpose, must be clear, unequivocal and satisfactory, Corey v. Roberts, 82 Utah 445, 25 P.2d 940 (1933); or clear, definite, unequivocal and conclusive, Thornley Land and Livestock Co. v. Gailey, 105 Utah 519, 143 P.2d 283 (1943).

Of course, the Court is not limited to examining only the instrument itself. It may look at all the circumstances in evidence. Parol defeasance is adequate (where not required by statute to be in writing), but only where precise, definite and certain. Bass v. Bell, 41 S.E. 893 (S.C. 1902). If parol evidence leaves in doubt whether a deed absolute on its face is a mortgage, the doubt must be resolved in favor of the absolute character of a deed. Lackey v. First National Bank of Oblong, 32 N.E.2d 949 (Ill. 1941).

An independent analysis of the evidence in the present case reveals a clear preponderance in favor of the trial court's findings and judgment. Even the parol evidence is not helpful

to Appellants, as it was admitted in trial that no payments have been made, nor even any arrangements made to pay, on what Appellants now choose to characterize as a mortgage. (Tr. 72). (This issue will be more adequately dealt with herein.)

POINT II

THE EQUITABLE DEFENSES OF "UNCLEAN HANDS" AND LACHES PRECLUDE THE APPELLANTS FROM MAINTAINING A SUIT IN EQUITY.

A. The Appellant comes into a court of equity with "unclean hands", and therefore is not entitled to equitable relief.

The Appellants have engaged in illegal, fraudulent and unconscionable conduct, related to this land controversy, such that no court of equity should even entertain their claim, far less grant them relief. In order for this equitable defense to operate against a party plaintiff, his wrongful actions do not necessarily have to be fraudulent or illegal, but any unconscientious conduct upon his part which is connected with the controversy will repel him from the forum whose very foundation is good conscience. De Garmo v. Goldman, 123 P.2d 1 (Cal. 1942). Yet Appellant Clyde A. Jacobson, the plaintiff below, committed a criminal act with regard to the property in question. The record discloses that in approximately 1969, the Appellant filed bankruptcy. (Tr. 45). In the course of the bankruptcy proceedings, he testified under oath that Respondent, his

father, owned the property in question. (Tr. 46). In the trial below, his testimony, also under oath, was that he gave false testimony in the bankruptcy proceedings.

> Q. (By Mr.Randle) . . .[W]hy did you give that testimony in the bankruptcy court?
>
> A. To save that property.
>
> Q. Why was it important for you to save that property?
>
> A. Well, I am pretty fond of that piece of property, is all.
>
> Q. And why were you "fond" of it?
>
> A. I don't know; I just liked it. (Tr.46).

First degree perjury was a felony in 1969 and was covered by the former Criminal Code, §§ 76-45-1 through 76-45-13 (see especially §76-45-7), Utah Code Ann. (1953). The new Criminal Code, which was in effect at the time of the trial below, makes perjury a second degree felony, §§76-8-501 through 76-8-505 (see especially §76-8-502), Utah Code Ann. (1953), as amended. Whether Appellant committed perjury in the bankruptcy action or in the trial below is not certain, and this is not a criminal trial for perjury. But Appellant has obviously sworn falsely under oath at one time or the other in order to secure property that he was "fond" of. He should be estopped from claiming any interest now. Reddy v. Aldrich, 11 So. 828 (Miss. 1892). Fondness for property never was a justification for perjury, theft, robbery or any other crime.

Appellant has "unclean hands" in another regard aside from the perjury. In the trial below, counsel for the plaintiff took pains to establish that the purpose in handling the conveyance in the manner in which it was done was to keep the property out of reach of Appellant's judgment creditors. (Tr. 7, 104, 113). The rule applies here that equity will not intervene to set aside at the request of a grantor a conveyance made in fraud of creditors. Under the "clean hands" maxim, a court of equity will not lend its aid to one who has been a participant in a transaction the purpose of which was to defraud creditors. Wickham v. Simpler, 180 P.2d 171 (Okla. 1946). The fact that an absolute conveyance is purportedly a mortgage rather than a deed is one of the "badges of fraud". So also is a delay in recordation of instruments affecting real property. Chester B. Brown Co. v. Goff, 403 P.2d 855, 859 (Idaho 1965).

It begins to appear that Appellant has asserted or denied ownership according to his own convenience. This may also serve to estop him from asking relief in equity. In Rhine v. Terry, 143 P.2d 684 (Colo. 1943), the plaintiff denied ownership whenever it would be a burden and asserted ownership whenever there might be a benefit derived, all to the detriment of the defendant. The Supreme Court agreed with the trial court in holding that the plaintiff's action for a declaratory judgment that defendant held title as security rather than in fee

simple was properly dismissed under the "unclean hands" maxim.

B. The Appellant's suit is barred by laches.

Equity will not lend its aid to the enforcement of stale demands. McKinnon v. Bradley, 165 P.2d 286 (Or. 1946). The doctrine of laches is derived from the maxim that equity aids the vigilant, not those who slumber on their rights. Arnold v. Melani, 449 P.2d 800 (Wash. 1969).

Laches is not mere delay, but delay which works to the disadvantage of another. In order to constitute laches, the two elements must be established: (1) The lack of diligence on the part of the plaintiff; (2) An injury to defendant owing to such lack of diligence. Papanikolas Bros. Enterprises v. Sugarhouse Shopping Center Assoc., 535 P.2d 1256 (Utah 1975).

In determining whether laches will bar a particular claim, it is proper to consider whether a party or an important witness has died, and the party against whom the claim is asserted has been deprived thereby of important testimony, or whether the property involved has increased in value, or whether the property has passed into the hands of an innocent third party, or whether the position of the parties is so changed otherwise that an injustice will follow failure to apply the doctrine. Barrett v. Zenisek, 315 P.2d 1001, 1007 (Mont. 1957).

Applying these statements of law to the present case, it is clear that laches should bar Appellants from recovery. First of all, Appellants could have sued for a declaratory

judgment anytime after 1966 when the deed naming Respondents as grantees was recorded (Tr. 8), but they waited for eight years, until 1974, to commence this action. Second, now Clyde E. Jacobson, one of the original defendants, has died and taken his testimony with him to the grave. Erma B. Jacobson, his wife and a co-defendant, is incapacitated and unable to give testimony. Third, according to counsel for the Appellants, the property has increased in value from $14,000.00 to over $60,000.00 (Tr. 4). Fourth, parts of the property have passed into the hands of innocent third parties (Tr. 9, 66). From all these facts, it is apparent that the position of the parties is so changed that an injustice will follow a failure to apply the doctrine of laches. Barrett v. Zenisek, supra.

POINT III

THE TRIAL COURT PROPERLY HELD THAT THE EVIDENCE FAILS TO ESTABLISH THAT THE WARRANTY DEED WAS INTENDED AS A MORTGAGE.

A. The Appellants did not sustain their burden of proof.

A party asserting that a deed absolute in form was given to secure a debt, and therefore is in fact a mortgage, has the burden of proving the assertion by evidence that is clear, definite, unequivocal and conclusive, Thornley Land

and Livestock Co. v. Gailey, supra. A deed will not be found to be a mortgage on vague, uncertain or contradictory evidence, Reeves v. Abercrombie, 19 So. 41 (Ala. 1895), and any doubt must be resolved in favor of the absolute character of a deed, Lackey v. First National Bank of Oblong, supra. The Appellants had a full and fair hearing, even to the extent of allowing testimony that is arguably barred by the Dead Man's Statute, §78-24-2, Utah Code Ann. (1953), as amended, (Tr. 29-36, 67-70), yet they failed to convince the trial court. They do not have any lighter burden before this Court.

B. All the necessary elements of a valid deed were present.

It is undisputed that the deed in question was delivered and accepted. Although there was some dispute as to the property description and the acknowledgement, the attorney who prepared the papers testified upon cross examination that the legal description was on the deed at the time it was signed (Tr. 117-118), and on direct and cross examination testified that he would not have acknowledged the signatures of grantors had they not appeared before him and signed in his presence. (Tr. 108, 109; 115, 117). Appellant also admitted that the signatures were not forged.

Q. (By Mr. Stott) Well, your signature isn't forged is it?

A. No, my signature is not forged.

Q. And your wife's signature is not forged, is it?

A. No, it's not forged. (Tr. 55).

. . .

Q. So the record is straight, and counsel and I understand your testimony, your wife's signature and your signature is not forged as they appear on the document now, are they?

A. No, It's not a forged signature. No. (Tr. 57).

The only question left is whether the grantees were named in the conveyance. In the first place, the acknowledgment and recordation of a deed give rise to a presumption of genuineness, due execution and delivery. This presumption should not be regarded lightly but should be given great weight, and not overthrown by a mere preponderance of the evidence. Northcrest, Inc. v. Walker Bank & Trust Company, 122 Utah 268, 248 P.2d 692 (1952); 1 C.J.S. Acknowledgments §141, p. 901.

Second, at the time that the grantees names were filled in, the grantors intended that the grantees should take title. This intent was shown by the subsequent conduct of the parties, as will be discussed infra. Even if the grantee's name is not filled in at the time of acknowledgment, if the blank is filled in by one who had authority to complete the instrument, the deed becomes operative as a conveyance. Burnham v. Eschler, 116 Utah 61, 208 P.2d 96 (1949). Some cases have held that a deed delivered in blank to the grantee gives him authority to fill it out in his own name or in the name

of his grantee or purchaser, and the conveyance relates back to the time of execution by the grantor. Fisher v. Paup, 180 N.W. 167 (Iowa 1920); Hoey v. Ebert, 258 N.W. 228 (Mich. 1935); Holliday v. Clark, 110 S.W.2d 1110 (Mo. 1937). It is not necessary that the deed be re-executed or re-acknowledged when the grantee's name is filled in. Burnham v. Eschler, supra.

In the present case, the grantees' names were filled in with the express or implied authority of the grantors, as subsequent events showed. In any event, when Respondent paid the full price for the property he became the equitable owner of the premises and was entitled to a deed, even if the grantor had refused. Cf. Hoey v. Ebert, supra. Any transactions with, or intent with regards to, Mr. Stubbs are therefore immaterial here.

C. Based on the evidence before the trial court, the necessary elements of a mortgage were not present.

It is true, as Appellant contends, that no particular form is necessary to constitute an enforceable mortgage. Bybee v. Stuart, 112 Utah 461, 189 P.2d 118 (1948). However, Bybee v. Stuart is not good authority for the Appellant in this case because in Bybee there was a separate writing, contemporaneous with the deed, and the two documents taken together constituted a formal mortgage. In the present case not only do we have no separate writing, but we don't have any parol evidence as to what the security agreement consisted of. What we do have is

the Appellant's testimony that there never really was any security agreement at all.

> Q. (By Mr. Stott) And your testimony further, as I understood it, was that there never really was any type of an arrangement or agreement that you had with your father as to how this money was to be repaid or in what manner it was to be repaid by, or under what terms, is that right?
>
> A. No.
>
> Q. You never did have an arrangement with him then, did you?
>
> A. We never did, no.
>
> Q. It was also your testimony, as I noted it, that there never was an arrangement between you and Mr. Stubbs, was there?
>
> A. No. (Tr. 72).

This case is closely analogous to Hunter v. Bane, 149 S.E. 467 (Va. 1929), in which the Court's finding that no mortgage existed was "inevitable" when the record showed that the grantor conveyed property encumbered with deed of trust liens to prevent foreclosure; no definite time was stated in the deed for repayment of the money advanced by grantee to relieve grantor of financial embarrassment; no offer was ever made by grantor to repay the money; there was no express agreement in the deed in regard to payment of interest; grantee improved the property; and grantee paid the taxes and insurance on the property for a period of years. In addition, the Court noted that the fact that grantor had "remained in part possession of the property, when viewed in light of the circumstances

detailed, cannot be regarded as inconsistent with an absolute conveyance of the same." 149 S.E. at 469.

In the present case, the trial court found that no evidence was introduced of the essential terms of a mortgage such as interest rate, term of repayment, or other requirements of any enforceable mortgage or security agreement. The Court further found that such essential elements would not be provided by the Court for the parties.

D. The subsequent actions and conduct of the parties show that Appellants intended to, and did, convey all interest in the property to Respondents.

In determining whether an absolute deed was intended as a deed or a mortgage, the courts may look at the relative situation of the parties prior to, at the time of and after the execution of the instruments, Holmes v. Basham, 45 S.E.2d 252 (W.Va. 1947); their conduct, Morris v. Rickmeyer, 82 P.2d 472 (Cal. 1938); and their subsequent dealings with the property, Thornley Land and Livestock Co. v. Gailey, supra; Corey v. Roberts, supra.

The following factors and circumstances show that Appellants intended to and in fact did abandon all claims or interest in the property:

1. Appellant Regina Jacobson, in her initial pleading of a divorce suit brought against Clyde A. Jacobson in 1973, claimed no interest in the property. The latter, in his

responsive pleadings, likewise failed to claim an interest in the property. (Tr. 60, 61).

2. In bankruptcy proceedings, as evidenced by the certified record from the bankruptcy court, an exhibit in this case, Appellant not only failed to claim an interest in the property, but testified under oath that it belonged to Respondent. This Court may well choose to believe that testimony.

3. For much of the time between the conveyance to Respondents and the present, Appellants did not occupy the premises. By Appellant's own testimony in court, he established that he moved in and out. (Tr. 49). He was gone for one four-to-six month period. On another occasion, he moved to a home in Payson while Respondents' daughter and son-in-law occupied the premises for just short of a year, (Tr. 50). Finally, in 1973, Appellants abandoned the property completely and moved to Orem (Tr. 51) where they continue to reside.

4. In addition to these absences, Appellants only assisted occasionally in managing or maintaining the property. It was farmed and maintained primarily by the Respondents, who openly dealt with the property as their own.

5. Appellants made no payments at all on what they now choose to characterize as a mortgage.

> Q. (By Mr. Stott) During the time that you lived on the property, you paid no one any sums of money for your occupancy on the property, did you?

A. No. (Tr. 62).

. . .

Q. And you have paid nothing toward, either to Mr. Stubbs or to your father, or to your father's estate toward the purchase of that property, have you?

A. No. (Tr. 72).

There was some testimony that Appellant helped his father out on weekends, but there was no evidence whatsoever of the value of those services or that they were pursuant to an agreement. For all that appears on the record, such actions were nothing more than what any son would do for his father.

6. The Respondents conveyed away part of the land and received the payments therefor. (Tr. 9).

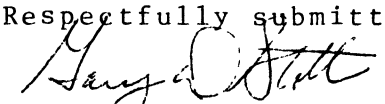
7. The Respondents paid all the taxes, insurance, and assessments on the property from the time of the conveyance to the present. No taxes, insurance or assessments were paid by the Appellants during that entire period. (The Appellant contends that he allowed the Respondent to take the money from the lease payments and the crop harvest to pay the taxes. However, that is not probative of ownership in this case, because whether or not that money was Appellant's to give depends upon ownership of the property. That is the whole question in issue here.)

CONCLUSION

Appellants paid a down payment and two years' worth of monthly installments, plus incidental weekend favors, for a piece of property they now acknowledge is worth in excess of $60,000.00. They claim this property free and clear. They are not really asking this Court to declare the deed a mortgage. That would involve interest rates, terms of repayment, etc., which the Court cannot supply for the parties. They are really asking this Court to just give them the property. Respondents paid full price for the property years ago, recorded their deed, paid the taxes, insurance, etc., and generally treated the property as their own. Appellants had notice of to whom the title was registered since 1966, but waited eight years to assert their ownership. Now the Respondents are dead or incapacitated and unable to effectively defend their title.

Thus, especially in light of the Appellants' unconscionable and illegal conduct with respect to the property, it would be a manifest injustice to the Respondents and their heirs or devisees to wrest the property from them and give it to Appellants. The judgment of the trial court is clearly correct and should be affirmed.

Respectfully submitted,



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CERTIFICATE OF MAILING

This is to certify that two true and exact copies of the foregoing Brief of Respondents were mailed to W. Jerry Ungricht, 807 East South Temple, Suite #202, Salt Lake City, UT 84103, this 30th day of July, 1976.

Jean Tripp